

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	Case No. S068673
Plaintiff–Adverse Party,	Multnomah County Circuit Court
v.	Case No. 21CR19107
RANDY GRAY,	MANDAMUS PROCEEDING
Defendant–Relator.	

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF
OREGON AND OREGON CRIMINAL DEFENSE LAWYERS
ASSOCIATION IN SUPPORT OF RELATOR'S OPENING BRIEF**

Alternative Writ of Mandamus Issued to the Honorable Angel Lopez,
Multnomah County Circuit Court Judge

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INTRODUCTION

Amicus curiae American Civil Liberties Union of Oregon (ACLU of Oregon) is a statewide nonprofit and nonpartisan organization with over 28,000 members. ACLU of Oregon is a state affiliate of the national ACLU organization. *Amicus* is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental rights protected in the Oregon Constitution and the United States Constitution.

Amicus curiae Oregon Criminal Defense Lawyers Association (OCDLA) is a nonprofit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators, and related professionals dedicated to defending Oregonians who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, networking, and legislative action. *Amicus* is concerned with legal issues presenting a substantial statewide impact to criminal defendants.

Amici are aligned with Defendant–Relator Randy Gray and adopt Relator's statement of the case and proposed rules of law. *Amici* write to provide background on the historical role of the grand jury as an independent body that protects citizens against governmental overreach and modern reform efforts that demonstrate the importance of permitting

counsel in the grand jury room. Excluding counsel impairs the grand jury's function and hampers defense practitioners' ability to provide effective assistance of counsel. In contrast, the presence of counsel promotes the purpose of grand jury as a check on the state's charging authority by encouraging a meaningful fact-finding process based on the evidence and it protects the rights of criminal defendants.

SUMMARY OF ARGUMENT

Relator argues, and *amici* agree, that a grand jury proceeding is a critical stage of a criminal proceeding at which a defendant is entitled to the presence of counsel. *Amici* urge this Court to issue a preemptory writ of mandamus confirming Relator's right to have defense counsel appear with and advise him in the grand jury room during his testimony. In particular, *amici* urge this Court to evaluate Oregon's practice of excluding defense counsel from the grand jury room in the broader context of national grand jury reform efforts and the experience of other states. Excluding counsel is harmful to both the grand jury process as well as the rights of individuals. *Amici* show that the presence of counsel in the grand jury room provides criminal defendants with necessary assistance in coping with the complex legal issues that defendants face when testifying before grand juries.

ARGUMENT

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to have counsel at his side during any “critical stage” of a prosecution. See *Rothgery v. Gillespie County*, 554 US 191, 212 (2008) (“Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings * * *.”) (footnote omitted). The guarantee under Article I, section 11, of the Oregon Constitution is arguably even more broad: “[C]ounsel cannot be excluded from any stage of the criminal prosecution at which a defendant is to be ‘heard.’” *State ex rel. Russell v. Jones*, 293 Or 312, 315, 647 P2d 904 (1982). This Court, however, looks to United States Supreme Court decisions for guidance in interpreting the right. See *id.* (explaining that “we have the benefit of decisions of the United States Supreme Court under the Sixth Amendment, which * * * was intended to assure similar protection to that stated in Article I, section 11.”).

The determination of whether a hearing is a critical stage depends upon the need for counsel’s assistance during the hearing. In the Supreme Court’s words, the determination depends “upon an analysis ‘whether potential substantial prejudice to defendant’s rights inheres in the * * * confrontation and the ability of counsel to help avoid that prejudice.’”

Coleman v. Alabama, 399 US 1, 9 (1970) (quoting *United States v. Wade*, 388 US 218, 227 (1967)). Or, put another way, the question is “whether the accused required aid in coping with legal problems or assistance in meeting his adversary.” *United States v. Ash*, 413 US 300, 313 (1973).

A grand jury proceeding is a critical stage of a prosecution and a court is required to allow defense counsel to appear at the hearing accordingly. Excluding counsel from grand jury proceedings harms defendants who seek to exercise their right to testify. In contrast, reform models and guidance from other states demonstrate that the presence of counsel benefits the grand jury’s truth-seeking function and promotes access to justice.

I. Access to counsel is a critical component of the criminal justice system that should be available to grand jury witnesses.

A defendant’s right to meaningfully consult with a lawyer is central to the legitimacy of the criminal justice system in the United States. See National Association of Criminal Defense Lawyers (NACDL), *Federal Grand Jury Reform Report & “Bill of Rights”* 10 (2000) (“A key aspect of our criminal justice system is the ability to consult with counsel.”). Yet, in Oregon, courts exclude defense counsel from the room when a defendant testifies, under oath, at grand jury proceedings in which the defendant is accused of a felony—even when the state has already charged the

defendant with a misdemeanor offense. If a defendant wants to consult with defense counsel, the defendant must ask to stop the proceedings, leave the room, and consult the attorney in the hallway.

Calls for grand jury reform have long denounced the practice of excluding counsel from the grand jury room. In 1975, the American Law Institute (ALI) admonished: “The spectacle of a witness leaving the grand jury room to report questions to a lawyer required to remain outside seems degrading and irrational.” ALI, *A Model Code of Pre-Arraignment Procedure* 604 (1975). And in 1982, the American Bar Association (ABA) cautioned: “Requiring a witness who needs advice of counsel to consult with his attorney outside the grand jury room door is awkward and prejudicial. It * * * places the witness in an unfavorable light before the grand jurors.” ABA, *Grand Jury Policy and Model Act* 6 (1982). The ABA called the practice “degrading” and “extremely damaging.” *Id.*

Continuing the practice in Oregon is anomalous and unjust. As professional legal organizations repeatedly pointed out at the height of grand jury reform efforts in the 1970s and 1980s, “[n]owhere else in the criminal justice system is a person who wants a lawyer denied the right to have a lawyer at his side when he is questioned.” See, e.g., NACDL, *Reform Report* at 10; ABA, *Grand Jury Policy* at 6 (“Almost nowhere else in

the criminal justice process—except before the grand jury—is a person who desires a lawyer denied that right.”). For that matter, it would be unheard of and unethical for an attorney to question a *civil* defendant without the attorney present. *E.g.*, *In re Newell*, 348 Or 396, 413, 234 P3d 967 (2010) (approving public reprimand of attorney who questioned represented party in a deposition for violation of Rule of Professional Conduct 4.2, which largely prohibits an attorney from directly questioning a person represented by counsel).

Professional legal organizations have called for change, and many jurisdictions have corrected the practice. Several organizations—including the ALI, the ABA, the NACDL, and the Cato Institute—issued publications advocating for the right of a witness to have a lawyer at his side when he testifies at grand jury proceedings. And many states across the country have upheld the right through legislation. Practical experience in those states demonstrates that the presence of counsel benefits the grand jury proceedings as a whole.

A. Calls for grand jury reform consistently recommend allowing counsel in the room when a witness testifies.

The purpose of the grand jury is to serve as a check on governmental power. *United States v. Manduiano*, 425 US 564, 571 (1976) (describing the “historic office” of the grand jury as “a shield against arbitrary or

oppressive action”). Historically, the institution served this purpose—at least in colonial North America. See W. Thomas Dillard, Stephen R. Johnson, and Timothy Lynch, *A Grand Façade: How the Grand Jury Was Captured by Government*, 476 Policy Analysis 5 (May 13, 2003) (describing colonial 18th century grand juries as “well known for their independence”).

Over time, however, critics have increased their scrutiny toward the prosecutor’s influence in the grand jury system. The often-unchecked power of the prosecutor in modern grand jury proceedings has caused the institution to devolve into what the Cato Institute characterizes as “an inquisitorial bulldozer that *enhances* the power of the government and now runs roughshod over the constitutional rights of citizens.” *Id.* at 1 (emphasis in original).

Contemporary critics focus on prosecutorial abuses and the failure of the institution to protect individuals against government excess. See ABA, *Grand Jury Policy* at 1 (describing “increasing charges of grand jury abuse—charges that the grand jury is but a ‘tool’ of the prosecution, and charges that its investigative powers are being used unfairly”); Jay Fenster, *The Presence of Counsel in the Grand Jury Room*, 47 Fordham L Rev 6, 1139 (1979) (stating that contemporary critics focus “on such prosecutorial abuses * * * as intimidation and harassment of witnesses, unauthorized

disclosures of grand jury proceedings, and the collection of evidence for use against defendants after they have been indicted"); NACDL, *Reform Report* at 1 (characterizing the federal grand jury as "a captive of federal prosecutors" who exercise "enormous power, unrestrained by law or judicial supervision"). Former New York Court of Appeals Judge Sol Wachtler's observation that "district attorneys now have so much influence of grand juries that by and large they could get them to indict a ham sandwich" is now a common refrain. Ben Zimmer, "*Indict a Ham Sandwich" Remains on the Menu for Judges, Prosecutors*, Wall Street Journal (June 1, 2008, 10:24 AM), <https://www.wsj.com/articles/indict-a-ham-sandwich-remains-on-the-menu-for-judges-prosecutors-1527863063> (quotation marks omitted).

Professional organizations have issued lengthy studies with suggestions for institutional reform and model legislation. Central to the reform proposals and model acts is the right of a witness to have a lawyer at his side when he testifies at grand jury proceedings. For example, the ALI's *A Model Code of Pre-Arraignment Procedure*, published in 1975, has a provision that preserves a defendant's right to the presence of counsel when testifying at grand jury. ALI, *Model Code* at 236 ("a defendant * * * shall be given an opportunity to testify before the grand jury * * * * The

counsel for a witness may accompany him before the grand jury while he testifies * * *.”).¹ The commentary to the provision notes the “complex and important legal issues” that a witness faces when testifying before a grand jury, including the danger of self-incrimination, imprisonment for contempt, the potential use of testimony for impeachment, and the inadvertent waiver of privilege. *Id.* at 602.

The issue of counsel in the grand jury room figures so prominently in grand jury reform efforts that it is often the first proposal for change. For example, the ABA’s *Grand Jury Policy and Model Act*, published shortly after the ALI issued its model code, lists thirty “grand jury principles,” or recommendations for reform. The first principle on the ABA’s list is the right

¹ ALI’s model legislation, and that of other organizations, prohibits counsel from interjecting in the proceedings. See ALI, *Model Code* at 236 (“The counsel for a witness * * * shall not participate in the proceedings except by advising the defendant.”); ABA, *Grand Jury Policy* at 4 (“Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.”); NACDL, *Reform Report* at 10 (“Such counsel shall not be permitted to address the grand jurors, stop the proceedings, object to questions, stop the witness from answering a question, nor otherwise take an active part in proceedings before the grand jury.”). The stated purpose of these limitations is to prevent grand jury proceedings from evolving into a mini-trial. See ABA, *Grand Jury Policy* at 7 (“[T]he limitations on the role of counsel will forestall the grand jury’s being turned into an adversary proceeding.”). *Amici* follow Relator in not conceding that such limitations are appropriate where the constitutional right to counsel has attached. See *Defendant–Relator’s Opening Brief* at 25, n.8.

of a witness to have counsel in the room. ABA, *Grand Jury Policy* at 4 (stating that “a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury.”).

Similarly, the NACDL’s *Federal Grand Jury Reform Report & Bill of Rights* first endorses the right of a witness to have his lawyer at his side when he testifies: “A witness before the grand jury who has not received immunity shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel * * * shall be allowed to advise the witness.” NACDL, *Reform Report* at 10. The NACDL’s commentary notes that excluding a witness’s lawyer is unfair and that a grand jury witness faces significant legal risks when testifying. *Id.* These risks include potential self-incrimination, contempt and perjury charges, and the inadvertent waiver of privilege. *Id.*

Finally, the Cato Institute issued a policy analysis in 2003 that denounced the modern grand jury as a vehicle for unchecked prosecutorial power. Dillard, 476 Policy Analysis at 1 (stating that “the single most important fact to appreciate about the grand jury system is that it is the prosecutor who calls the shots and dominates the entire process.”). The Cato Institute likewise emphasized the right of any witness compelled to appear before the grand jury to be accompanied by counsel. *Id.* at 13.

These studies and reform efforts are not unknown to Oregon lawmakers. In 2015, critics renewed their calls for grand jury reform after grand juries declined to indict law enforcement officers involved in Michael Brown's death in Ferguson, Missouri, and Eric Brown's death in Staten Island, New York. Lauren-Brooke Eisen, *What Is on the Horizon for Grand Jury Reform?* Brennan Center for Justice (January 23, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/what-horizon-grand-jury-reform>. Oregon had the “dubious distinction” of being one of three states that relied on handwritten notes for its official record of grand jury proceedings. *Id.*

Shortly thereafter, Oregon lawmakers considered grand jury reform legislation. Senate Bill (SB) 822 (2015) required the verbatim recording of grand jury testimony, and SB 825 (2015) provided certain criminal defendants with the right to appear as a witness before the grand jury. Supporters of both bills aimed to promote transparency and accountability in Oregon’s grand jury proceedings.²

² See, e.g., Video recording, Senate Committee on Judiciary, SB 822 and 825, March 31, 2015, at 0:08:13-0:08:43 (comments of Sen Jeff Kruse); 2:01:30-2:02:05 (comments of Kimberly McCullough), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2015031047> (accessed Nov 26, 2021).

Supporters of SB 825 cited the ABA, NACDL, and Cato Institute materials in promoting the right of a defendant to testify at grand jury proceedings. Exhibits 8, 9, 11, Senate Committee on Judiciary, SB 825, March 31, 2015. As Relator discusses, however, stakeholders could not reach an agreement regarding the presence of defense counsel and left the statute silent on that point. *Defendant–Relator’s Opening Brief* at 33-35. As a result, Oregon continued the “degrading and irrational” practice of excluding counsel from the grand jury room despite the 2015 legislation.

B. Many states safeguard the right of a witness to have counsel accompany a witness who testifies before the grand jury.

Many states have enacted legislation protecting the right of a witness to have counsel present in the grand jury room during that witness’s testimony. These states include Arizona (Ariz Rev Stat § 21-412); Colorado (Colo Rev Stat § 16-5-204(4)(d)); Illinois (725 Ill Comp Stat Ann § 5/122-4(b)); Kansas (Kan Stat Ann § 22-3009); Massachusetts (Mass Gen Laws Ann ch 277, § 14A); Michigan (Mich Comp Laws § 767.3); Minnesota (Minn R Crim P 18.03); New Mexico (NM Stat Ann § 31-6-4); New York (NY Crim Proc Law § 190.52); Oklahoma (22 Okla Stat § 340); Pennsylvania (42 Pa Cons Stat § 4549(c)); South Dakota (SD Codified Laws § 23A-5-11); Utah (Utah Code Ann § 77-10a-13(2)(a)); Virginia (Va Code Ann § 19.2-209);

Washington (Wash Rev Code § 10.27.080); and Wisconsin (Wis Stat § 968.45(1)).³

The practical experience from many of these states shows that allowing counsel to accompany a testifying witness has many benefits. First, witnesses testify more clearly and informatively with the assistance of counsel. Practitioners and judges in jurisdictions where witnesses and defendants are permitted to have counsel at their side have specifically reported this benefit. For example, in Colorado, “[p]rosecutors reported that witnesses appear more comfortable when accompanied by counsel.”

National Institute of Justice, *Grand Jury Reform: A Review of Key Issues* 92 (Jan 1983). Moreover, “[a] judge who has had occasion to review grand jury transcripts indicated that the testimony of witnesses appearing with

³ Much like the model legislation discussed in footnote 1, state law often prohibits a witness’s lawyer from objecting during grand jury proceedings. See, e.g., Colo Rev Stat § 16-5-204(4)(d) (“[C]ounsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury.”); Mass Gen Laws Ann ch 277, § 14A (“[C]ounsel in a proceeding before a grand jury shall make no objections or arguments or otherwise address the grand jury or the district attorney.”); Minn R Crim P 18.03 (“The attorney cannot participate in the grand jury proceedings except to advise and consult with the witness while the witness testifies.”). *But see* Kan Stat Ann § 22-3009(b) (“Counsel for any witness may be present while the witness is testifying and may interpose objections on behalf of the witness.”). *Amici* do not concede that those limitations are appropriate where the constitutional right to counsel has attached.

counsel was better prepared and presented more meaningful information.”

Id. at 93.

Second, allowing witnesses to have an attorney in the room with them when they testify means that they testify more often, which aids the grand jury in its investigative function. A senior staff attorney with the ACLU of Arizona reported that when he was a public defender in Arizona, he had a client who testified before the grand jury. App-1. He was able to join the client during his testimony, but had his client not had the right to have counsel in the room, he “almost certainly would not have testified before the Grand Jury and the Grand Jurors would have been left without testimony they believed was critical to their deliberations in that case.” *Id.*

Third, when defendants testify more often, grand juries return more no true bills. In 2004, the New York Times reported:

At the Legal Aid Society, which represents tens of thousands of defendants every year, some lawyers have aggressively allowed their clients to testify before grand juries. In some years, they said, grand jurors in some boroughs voted not to indict *more than 60 percent of cases* in which Legal Aid clients testified.

William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, The New York Times (June 20, 2004), <https://www.nytimes.com/2004/>

06/20/nyregion/new-trend-before-grand-juries-meet-the-accused.html (emphasis added). Allowing lawyers inside the room thus results in grand juries more effectively being able to screen weak cases from the criminal system. See *id.*

Fourth, allowing counsel in the room is more efficient. See NACDL, *Reform Report* at 10 (explaining that the proposed reform “will actually be less disruptive of grand jury proceedings than the current practice of stopping the proceedings so that the witness can leave the grand jury room”) (emphasis in original). Cf. ALI, *Model Code* at 603 (pointing out that “[i]f the witness plays safe by choosing to consult with his attorney after every question, and thus avoids any possible violation of his legal rights, the resulting delay is immense.”). A former chief deputy district attorney in Colorado reported that prosecutors prefer having counsel in the room in part because it “speed[s] the process by eliminating the walk outside the courtroom on every question * * *. ” NACDL, *Reform Report* at 6-7.

Finally, grand jury proceedings are more fair when a witness can talk to a lawyer without interrupting the proceedings and leaving the room. The ABA reported that many prosecutors support having counsel in the room “as a means of insuring fairness in the system.” ABA, *Grand Jury Policy* at 6; see also NACDL, *Reform Report* at 6-7 (recounting the statement of a

former prosecutor that “[t]he presence of counsel has a definitely positive effect.”). As the NACDL noted, the presence of counsel in the grand jury room “is eminently fair, and can help prevent injustice to the witness * * *.” *Id.* at 10.

II. Oregon’s current practice of excluding counsel from the grand jury room harms criminal defendants.

A lawyer cannot be very effective when a closed door stands between her and her client testifying on a witness stand. Excluding counsel from the grand jury room dissuades defendants from exercising their right to testify at grand jury proceedings in Oregon. And when defendants do exercise the right, excluding counsel hinders defendants’ ability to effectively present testimony and poses other significant legal risks.

A. Lack of access to counsel prevents criminal defendants from accessing the statutory right to testify at grand jury.

Oregon’s current practice of excluding counsel from the grand jury room prevents many defendants from testifying at grand jury proceedings. Understandably, not many defendants choose to go into the grand jury room to face the questioning of the prosecutor and grand jurors without their lawyers at their side.

Anecdotal evidence shows that Oregon’s current practice prevents many attorneys from advising their clients to testify at grand jury. In

anticipation of this briefing, OCDLA conducted an informal survey of its members about their practice in advising clients about grand jury.⁴ Our members reported that many clients considered testifying at proceedings but ultimately declined in part because they could not have their lawyer at their side when they testified. Only about 40% of the lawyers who responded had ever advised a client to testify before grand jury, and only 47% had ever represented a client who actually testified before grand jury. Nearly 95% of attorneys surveyed said that they would be more likely to advise a client to testify if they could be present at grand jury.

B. When criminal defendants exercise the right to testify without their attorneys in the room, they face significant legal risks.

Excluding counsel harms those defendants who decide to testify at grand jury proceedings. A lawyer is not a mind reader that can prepare her client for every potential question that a grand juror or prosecutor may ask. See ALI, *Model Code* at 602 (“[C]ounsel in advising his client how to react in the face of a possible future interrogation can never anticipate every possible question that may be put to his client.”).

Even when a lawyer has managed to accurately predict questioning, her client may not recall her advice in the pressured atmosphere of the

⁴ Thirty-five attorneys appearing in at least 21 of Oregon’s 36 counties responded.

grand jury room.⁵ *Id.* at 601 (“[T]he inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney’s instructions even if his attorney could anticipate the questions.”); NACDL, *Reform Report* at 10 (“In the intimidating atmosphere of the grand jury, the witness may have difficulty remembering his attorney’s instructions and maybe too frightened to request a halt in the proceedings so he can consult with counsel outside the grand jury room.”).

Furthermore, a lay witness untrained in the law cannot be expected to know and respond to the complex legal issues she faces when testifying before the grand jury. See ALI, *Model Code* at 603 (stating that “[i]t will be difficult for the witness to know when a particular question does present a danger of self-incrimination, or when the question violates his right with respect to a certain type of privileged communication.”). Defendants need their attorneys to cope with the complex legal problems they may face when testifying under oath. See *Ash*, 413 US at 313.

⁵ Grand jury proceedings are a stressful environment. One OCDLA survey respondent reported that although she has had several clients testify before the grand jury, she has never received an accurate account of what happened during the proceedings because her clients were still “so nervous” afterward. She would have to wait for the recordings of the grand jury proceedings to learn what her clients did or did not say.

The dangers of testifying without one's lawyer in the room are not just academic. OCDLA survey respondents recounted horror stories of sending their clients into the grand jury room alone. One respondent reported that her client faced aggressive and argumentative cross-examination and requested to speak to his attorney. When he did so, the grand jurors chuckled at his predicament, which caused the client to withdraw his request.

Other respondents also reported that their clients were faced with aggressive cross-examination by the prosecutor. In one case, a prosecutor first drew out all of the defendant's convictions for impeachable offenses and then asked, "So, what do you want to say?" The client became nervous and forgot to include a key piece of his testimony—that he did not have a weapon in his hand—which was central to his presentation of self-defense. The client certainly could have used his lawyer's "assistance in meeting his adversary." See *id.*

III. Permitting counsel to accompany a client inside the grand jury room is beneficial to the administration of justice.

Allowing a defendant to have counsel at his side benefits the grand jury process in many ways. Permitting counsel in the grand jury room assists the defendant in providing the grand jury with useful information; it provides the defendant with much-needed moral and emotional support; it

prevents the inadvertent waiver of privilege; and it aids in the deterrence of prosecutorial misconduct and overreach. Law review literature and anecdotal evidence from OCDLA's members illustrate these benefits of the full exercise of the right to assistance of counsel.

A. The presence of counsel assists the defendant in providing testimony.

Witnesses provide more informative testimony when they have a lawyer at their side, which assists the grand jury with its investigative purpose:

Counsel can also help the witness provide the grand jury with the information it seeks. It may be difficult for a witness to see the broader issues the grand jury is attempting to resolve when asked specific legal questions. But an attorney will see how a prosecutor's questions build on each other and discern the significance of a witness's answers. For example, an attorney can suggest that a witness answer narrowly if the issue the grand jury is broaching borders on being privileged. Or, an attorney might suggest a longer, background-oriented explanation in order to show the grand jury "the big picture"—those circumstances that explain the witness's behavior or perhaps even those that give rise to a defense. It is unlikely that a witness would alone be able to make such important assessments while under the grand jury's scrutiny.

Kathryn E. White, *What Have You Done With My Lawyer?: The Grand Jury Witness's Right to Consult With Counsel*, 32 Loy LA L Rev 907, 931-32 (April 1999).

Furthermore, an attorney can assist her client by eliciting information regarding the elements of a crime or a defense that a layperson may omit, especially in the stressful environment of testifying at grand jury proceedings. A defendant's testimony at grand jury is particularly helpful in cases where affirmative defenses such as self-defense and defense of property apply.⁶ In such nuanced situations, the close assistance of counsel is needed to provide the grand jury with all pertinent information.

OCDLA survey respondents emphasized the ways in which their presence could assist their clients with providing the grand jury with key parts of their story:

- Many of my clients are not savvy or put together enough to be able to express a story in a narrative form. It would make a huge difference and would be a much more reasonable way to present story.
- If I were able to direct questions to clients, I could make sure they got out the key parts of their story, which can be hard for them to remember without prompts.

⁶ Supporters of SB 825 explained to lawmakers that defendants' testimony would be especially helpful to grand juries in self-defense and defense of property cases. Video recording, Senate Committee on Judiciary, SB 822 and 825, March 31, 2015, at 0:39:15-0:41:56 (comments of Jason Short), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2015031047> (accessed Nov 26, 2021); Video recording, House Committee on Judiciary, SB 825, May 13, 2015, at 0:01:47-0:02:06 (comments of Sen Kim Thatcher); 0:29:50-0:31:16 (comments of Jeff Howes), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2015051176> (accessed Nov 26, 2021).

More complete and helpful testimony assists the grand jury with its investigative function because it ensures that the defendant presents the entire story in a coherent way that is tied to a crime or defense's elements.

Survey respondents also emphasized how easily a layperson can lose their composure when confronted with questioning from a prosecutor or grand juror:

- Clients have little idea how easy it is to be trapped into an answer, which, while not necessarily false, simply helps the prosecution and hinders his ultimate defense.
- If I am not there, they may get flustered/emotional and * * * tripped up.

Faced alone with the professional interrogation of a trained and experienced prosecutor, a witness is susceptible to techniques meant to elicit specific information that make him look untruthful or untrustworthy. This does not assist the grand jury with its investigative function. Rather, it takes advantage of a one-sided situation. The presence of counsel in the grand jury room would ameliorate the defendant's susceptibility to such techniques and aid the defendant in providing the grand jury with useful information. A defendant faces "potential substantial prejudice" when confronted by a prosecutor's questions, and counsel could "help avoid that prejudice." See *Coleman*, 399 US at 9.

B. The presence of counsel provides the defendant with moral support.

The high-stress atmosphere of grand jury cannot be understated. The experience of testifying at grand jury is intense and nerve-wracking:

Picture going inside a “windowless jury room, a stark, cheaply furnished square box * * * not a friend in sight,” where the proceeding is “intimidating, even terrifying, and unlike any other proceeding known to the American judicial system.” As one professor put it, “testifying before a grand jury is a lot like a car crash * * * Sometimes you need dental charts to identify your client after it’s over.” Witnesses have described the experience as “lonely,” “one-sided,” “isolating,” and “emotionally overwhelming.”

White, 32 Loy LA L Rev at 932 (footnotes omitted).

OCDLA members would be more likely to advise their clients to testify at grand jury proceedings if they could be present because they could provide their clients with needed moral support and help defuse tension:

- I could do some hand holding and stop the process from being unnecessarily hostile.
- The extra person in the courtroom would let my client feel more comfortable and I would be there if things go haywire and they needed help.
- [My presence would help t]o ease client’s nerves and support them.
- [I could] request a break if my client needs to self-compose.

This would result in more relaxed and informative testimony for the grand jury. See White, 32 Loy LA L Rev at 932 (stating that “a more relaxed

witness will probably give better testimony than one who is needlessly under stress.”).

C. The presence of counsel assists in the assertion of privilege.

Counsel’s presence inside the grand jury room would aid in the appropriate assertion of any privilege. Laypersons cannot be expected to intuit the nuances of privileged information, which raise a myriad of potential legal issues:

The privilege against self-incrimination is not the only privilege held by a witness before the grand jury. The attorney-client privilege, the confidential marital communications and spousal privileges, and the privilege protecting patient and psychotherapist communications, among others, also apply. Just as it is difficult for a witness to determine when to assert the Fifth Amendment privilege, it is difficult for a witness to determine when to claim other privileges. The witness needs the advice of counsel to avoid inadvertently waiving any of these privileges.

White, 32 Loy LA L Rev at 931 (footnote omitted).

OCDLA survey respondents indicated that they would be more likely to advise a client to testify so that they could advise a client when not to answer a question:

- [I could t]ell client to not answer a question.
- Being present would allow me to assist in asserting any privilege.

Counsel's ability to prevent the inadvertent waiver of privilege is another example of how an attorney can assist a client in "coping with legal problems" faced during a grand jury proceeding. See *Ash*, 413 US at 313.

D. The presence of counsel helps to prevent prosecutorial misconduct and overreach.

Prosecutorial misconduct and overreach happen in grand jury proceedings. See NACDL, *Reform Report* at 2 ("Blind faith that misconduct does not occur behind the grand jury door would be naïve in the extreme."). And they happen in Multnomah County. In 2019, the Willamette Week reported that Multnomah County prosecutors engaged in a decades-long practice of neglecting to record true bill verdicts as required by law. Instead, prosecutors would report that the state was "unable to proceed" when a grand jury declined to indict. Katie Shepherd, *Multnomah County Prosecutors Violated an Oregon Law for Decades. Then They Got Caught*, Willamette Week (February 13, 2019, 5:22 AM), <https://www.wwweek.com/news/courts/2019/02/13/multnomah-county-prosecutors-violated-an-oregon-law-for-decades-then-they-got-caught/>. Had prosecutors been properly filing no true bills, they would have been forced to seek the court's approval before returning to a grand jury. The illegal practice allowed prosecutors to secretly bring cases before multiple grand juries without prior approval. *Id.*

Unfortunately, many other instances of prosecutorial misconduct and overreach exist in Oregon grand jury proceedings. In the 1990s, the Clatsop County District Attorney was disbarred after a grand jury indicted two police officers for misconduct based only upon the district attorney's unsworn statements. *In re Leonhardt*, 324 Or 498, 930 P2d 844 (1997). And in 2001, the public learned that the Josephine County district attorney's office had a systemic practice of presenting unsworn expert witness testimony to grand juries in drug and sex crime cases during grand jury orientation. Specifically in cases involving child sex abuse allegations, orientation witnesses told grand juries that children almost always testify truthfully about sexual abuse. Opinion–Letter, Filed June 6, 2001, *State v. Tina Marie Martin* (00CR0682). Grand jury reform stakeholders in Oregon cited these instances when testifying before lawmakers in support of SB 822 and 825. See Exhibits 6, 7, Senate Committee on Judiciary, SB 822 and 825, March 31, 2015.

Furthermore, former Oregon grand jurors cited numerous instances of prosecutorial misconduct and overreach when they testified in support of SB 822.⁷ One former grand juror described how a prosecutor and his legal

⁷ Video recording, Senate Committee on Judiciary, SB 822 and 825, March 31, 2015, at 0:52:03-0:59:14 (comments of Christopher Missiaen);

assistant repeatedly intruded on grand jury deliberations to ask “how it was going.”⁸ Another former grand juror testified that several prosecutors had advised the grand jury that if it was considering a no true bill vote, to instead return the indictment form to the prosecutor and inform the prosecutor about the case’s weaknesses. The former grand juror characterized the relationship of the prosecutor to grand jury as “too cozy.”⁹ Both described prosecutors as having elicited hearsay and other inadmissible evidence from grand jury witnesses.¹⁰

The presence of counsel inside the grand jury room would deter this and other misconduct. See Fenster, 47 Fordham L Rev at 1152 (“The presence of counsel inside the grand jury room would stand as a bulwark against abuses of the grand jury system.”) (footnote omitted). As the ABA put it in their report:

The presence of the attorney will not only reduce unfair speculation about the prosecutor’s conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings.

0:59:15-1:01:29 (comments of Jon Baldiuieso); 1:01:30-1:04:49 (comments of Randall Cook), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2015031047> (accessed Nov 26, 2021).

⁸ *Id.* at 0:52:44-0:54:40 (Missiaen).

⁹ *Id.* at 1:02:15-1:02:45 (Cook).

¹⁰ *Id.* at 0:54:42-0:56:27 (Missiaen); *Id.* at 1:02:50-1:03:45 (Cook).

ABA, *Grand Jury Policy* at 7.

Although verbatim recordation of grand jury proceedings may have curbed prosecutorial misconduct in Oregon, it has not fully solved the problem. One OCDLA survey respondent noted that:

- I'd MUCH prefer to be in the room. Having listened to GJ audio it's clear that the prosecutors run roughshod over the proceedings and don't accurately explain the law and ask inappropriate questions. I think even the presence of an opposing party could reign in some of the bad actors.

OCDLA respondents emphasized the ability of counsel's presence to prevent prosecutorial overreach:

- [If I was present,] I could do some hand holding and stop the process from being unnecessarily hostile.
- My mere physical presence would greatly discourage prosecutorial misconduct.
- [I could] make sure rules are being followed.
- My presence might make the prosecutor treat my client more fairly.

The presence of counsel inside the room while a defendant is testifying would aid in the prevention of prosecutorial overreach. This too is an example of counsel's presence providing a defendant with required "assistance in meeting his adversary." See *Ash*, 413 US at 313.

CONCLUSION

Amici support Relator's request that this Court grant a peremptory writ of mandamus commanding the trial court to permit defense counsel to appear with and advise Relator in the grand jury room during his testimony. National calls for grand jury reform have long noted the complex legal issues that grand jury witnesses face and have advocated for the presence of counsel in the grand jury room accordingly. Many states have enacted legislation protecting the right of a witness to have counsel present, which has proven to be beneficial to the administration of justice.

Oregon's practice of excluding counsel harms criminal defendants and the grand jury process in general because defense attorneys are less likely to advise their clients to testify at proceedings and when defendants do testify, they suffer as a result of not having their attorney in the room. Allowing the presence of counsel during grand jury proceedings provides criminal defendants with "required aid in coping with legal problems and assistance in meeting [their] adversar[ies]."¹ See *Ash*, 413 US at 313.

DATED December 1st, 2021.

Respectfully submitted,

/s/ Cassidy Rice
Cassidy Rice, 164682
Attorney for *Amici Curiae*

November 22, 2021

My name is Jared Keenan. I am attorney who has been licensed in Arizona since 2009. Currently, I am a Senior Staff Attorney with the ACLU of Arizona. Prior to joining the ACLU of Arizona, I worked as a public defender in Boston, Massachusetts and in Mohave and Yavapai Counties in Arizona.

In Arizona, “grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so.” A.R.S. § 21-412. Should the Grand Jury hear such evidence, the accused has “the right to advice of counsel during the giving of any testimony by him before the grand jury, provided that such counsel may not communicate with anyone other than his client.” *Id.*



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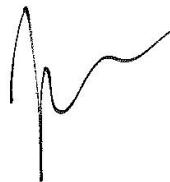
Jennifer Allen
Executive Director

Victoria López
Advocacy & Legal
Director

As a public defender, I requested that a person I represented be allowed to testify before the Grand Jury on three occasions. Of those three requests, the Grand Jury asked to hear the testimony from one of my clients. The process that I followed in all these occasions was very simple. Following a court-ordered remand for a redetermination of probable cause, I sent a letter to the prosecution alerting them that my client wished to provide testimony to the Grand Jury. The prosecutor responded with the time and location of the Grand Jury presentation, and I appeared with my client at that time to wait until we were told whether the Grand Jury wanted to hear the testimony or not.

When the Grand Jury elected to hear from my client, I was able to join him during his testimony and was able to take brief breaks when he had a question about procedure or needed legal advice while testifying. The process was efficient, and the Grand Jurors all thanked us for providing the testimony they wanted to hear. Had my client not had the right to counsel during that testimony, he almost certainly would not have testified before the Grand Jury and the Grand Jurors would have been left without testimony they believed was critical to their deliberations in that case.

Sincerely,



Jared G. Keenan
Senior Staff Attorney
ACLU of Arizona

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b), and that the word count for this brief as described in ORAP 5.05(1)(a) is **7,064** words.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

DATED December 1st, 2021.

Respectfully submitted,

/s/ Cassidy Rice
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CERTIFICATE OF FILING AND SERVICE

I certify that I filed this brief with the Appellate Court Administrator on this date by using the appellate courts' eFiling system.

I further certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participants' email addresses as recorded this date in the appellate eFiling system: Deputy Solicitor General Paul Smith, attorney for Plaintiff–Adverse Party; and Rian Peck and Christopher Marin Hamilton, attorneys for Defendant–Relator.

I further certify that I have this date served the Honorable Angel Lopez, who is not being served by the appellate courts' eFiling system, by mailing this brief, with postage prepaid, in an envelope addressed to:

The Honorable Angel Lopez
Multnomah County Courthouse
1200 SW 1st Avenue
Portland, Oregon 97204

DATED December 1st, 2021.

Respectfully submitted,

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